IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FIRST NATIONAL BANK & TRUST COMPANY, et al.,	)	
Plaintiffs-Appellees,	)	Nos. 96-5347
	)	96-5348
v.	)	96-5349
	)	96-5350
NATIONAL CREDIT UNION ADMINISTRATION, et al.,	)	96-5351
	)	96-5352
Defendants-Appellants.	)	

DEFENDANTS' MOTION FOR A STAY, OR IN THE ALTERNATIVE, A PARTIAL STAY, PENDING APPEAL AND PENDING SUPREME COURT REVIEW

INTRODUCTION

1. On July 30, 1996, this Court declared invalid the National Credit Union Administration ("NCUA")'s policy that interpreted the "common bond" requirement in 12 U.S.C. § 1759 to permit establishment of credit unions consisting of "multiple occupational . . . groups" so long as each group had its own common bond and was within the operational area of the credit union's offices. First National Bank & Trust Co. v. NCUA, 90 F.3d 525 (D.C. Cir. 1996). The Court remanded the case "for entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by [the AT&T Family Federal Credit Union]," id. at 531; and it denied rehearing on October 23, 1996. On behalf of the NCUA, the Solicitor General filed a petition for certiorari from this decision on November 26, 1996, seeking review by the Supreme Court during the current term. Petition

for Certiorari, NCUA v. First National Bank and Trust Co., No. 96-843 (U.S. Nov. 26, 1996).[1]

2. On October 7, 1996, while NCUA's rehearing petition was pending before this Court, the American Bankers Association and two other plaintiffs (collectively, "the ABA") filed a new action in district court seeking significantly broader relief than had been sought in the original suit brought by First National Bank and Trust, et al. Specifically, the ABA sought a temporary restraining order preventing the addition of new "select employee groups" to all federal credit unions, as well as barring the addition of new members to any existing such group. American Bankers Ass'n v. NCUA, No. 96-CV-2312 (TPJ) (D.D.C.). The district court consolidated this new action with the existing, remanded First National case.

On October 25, 1996, based on this Court's July 1996 decision, the district court issued an order preliminarily and permanently enjoining the NCUA and defendant-intervenors Credit Union National Association ("CUNA") and National Association of Federal Credit Unions ("NAFCU") (collectively "defendants") from authorizing federal credit unions to admit members who do not share a single common bond of occupation. Memorandum and Order (Oct. 25, 1996) at 8. On October 31, 1996, the Court clarified that this injunction not only bars the NCUA from approving new

[1] Intervenor Credit Union National Association ("CUNA") also filed a petition for certiorari on November 27, 1996.

select employee groups but also "bars credit unions from enrolling new members of existing occupational groups that do not share a common occupational bond with a credit union's core membership . . ." Memorandum and Order (Oct. 31, 1996) at 2-3.[2]

3. Defendants filed this appeal from the October 25 injunction on November 15, 1996,[3] and sought a stay from the district court pending both defendants' appeal of that order and final disposition by the Supreme Court of the NCUA's petition for certiorari in NCUA v. First Nat'l Bank and Trust Co. In the alternative, we requested that the court at least stay that portion of its order banning the enrollment of new members from previously approved employee groups. The district court denied the stay on December 4, 1996. We now request this Court to stay the district court injunction pending appeal and final Supreme Court disposition of the petition for certiorari seeking review of this Court's underlying July 1996 decision. In addition, given the severe and immediate disruption in the credit union industry, we seek this relief as soon as possible.[4]

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[2] In this memorandum, we refer to these two orders collectively as "the October 25th order."

[3] We filed a second notice of appeal on November 19, 1996, making clear that the NCUA was also appealing from the consolidated ABA case.

[4] Following the district court injunction, the NCUA had taken interim, emergency steps to deal with the district court's nationwide injunction in a manner consistent with this Court's July 30, 1996 opinion. The agency temporarily changed some of its rules in order to allow certain occupational credit unions to change their status either to that of a community-based credit union or to a single common bond based on a designated trade,

SUMMARY OF ARGUMENT

In the seven weeks since the district court issued its October 25th order, multiple occupational credit unions and members of the public already have begun to feel the deleterious impact of the order. With each day, credit unions turn away new members, lose capital investments, and damage their relationships with sponsoring employers. In turn, members of the public -- individuals who, for 14 years until October 25, 1996, possessed the right to join a credit union --- are left without access to affordable financial services, and many small businesses are left without a significant element of their employee benefits packages. As described below, the district court's order here has a disproportionate impact on workers with relatively low incomes and on very small businesses.

In light of these injuries, defendants satisfy the factors that justify a stay. First, as noted above, NCUA has filed a petition seeking certiorari in the First National case. Because the Solicitor General is pursuing defense of the NCUA multiple group policy before the Supreme Court, plaintiffs' likelihood of success on the merits should not, as the district court concluded, be deemed "a virtual certainty." See Memorandum & Order (Oct. 25, 1996) at 5. In addition, defendants have

(..continued)
industry or profession. See Interpretive Ruling and Policy Statement (IRPS) 96-2, 61 Fed. Reg. 59,305 (Nov. 22, 1996). When it denied defendants' request for a stay, the district court also enjoined this new interim policy. However, we do not, at this point, seek a stay of this latest injunction.

presented a "serious legal question" whether the injunctive relief sought by the American Bankers Association, affecting tens of thousands of previously approved select employee groups, is barred by laches and the applicable statute of limitations. In particular, laches should preclude an injunction against the admission of new members to previously approved select employee groups, where neither these plaintiffs nor any other plaintiffs have ever before sought this form of injunctive relief.

Second, and most critically, the balance of equities mandates a stay where, as here, only a stay will preserve the status quo and alleviate ongoing harm to the credit union industry and members of the public. We attach here several declarations -- first filed in the district court -- demonstrating that the October 25th injunction entered by the district court radically changed the status quo in the credit union industry and places many credit unions in financial jeopardy. Third, a stay of the injunction would not upset the status quo for plaintiffs' member banks, who never have demonstrated that any bank is suffering significant harm due to the multiple group policy. Indeed, even assuming that some new credit union members will have given up accounts with banks, the impact of such lost customers on any particular bank is minimal. Thus, plaintiffs here can far more easily weather a stay of limited duration than the credit union industry can withstand a decline in membership, employer-sponsored groups, and earnings.

For these reasons, and as explained below, we request this Court to stay the district court's October 25th order or, at a minimum, grant a partial stay (as described below), pending appeal of that order and pending Supreme Court disposition of defendants' petition for certiorari in First National. In the event that certiorari is granted, defendants request that any stay remain in place until the Supreme Court issues its final ruling. Because the Solicitor General has sought certiorari on an expedited basis, defendants hope to receive a decision from the Supreme Court during this term.

ARGUMENT

DEFENDANTS ARE ENTITLED TO A STAY PENDING APPEAL OF THE COURT'S OCTOBER 25TH INJUNCTION AND SUPREME COURT REVIEW OF THE FIRST NATIONAL CASE.

In determining whether to grant a stay pending appeal, this Court considers four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metro. Area Transit Comm'n ("WMATC") v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)); accord Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

In weighing these factors, the Court balances all of the equities, focusing primary attention on the issue of irreparable harm. Thus, "[t]o justify a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced." Cuomo. 772 F.2d at 974. Even where it disagrees with the moving party regarding the merits, a court may grant a stay if it finds that the moving party has presented a "serious legal question" and "when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." WMATC v. Holiday Tours, 559 F.2d at 844; see also Cuomo, 772 F.2d at 974 ("[a] stay may be granted with either a high probability of success and some injury, or *vice versa*."). As demonstrated below, this case raises several "serious" legal questions, and failure to grant a stay will inflict substantial and irreparable harm to the nation's federal credit unions.

A. Defendants Have A Substantial Case On The Merits.

1. As noted above, the Solicitor General, on behalf of the NCUA, has sought expeditious Supreme Court review of this Court's decision in the First National case. Therefore, the legal viability of NCUA's multiple group policy remains a serious and live issue. The fact that two district courts upheld the NCUA's construction of the Federal Credit Union Act ("FCUA") suggests, at the very least, that defendants have a substantial case on the

merits. See First City Bank v. NCUA, 897 F. Supp. 1042 (M.D. Tenn. 1995), appeal argued, No. 95-6543 (6th Cir. Oct. 15, 1996); AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co., 863 F. Supp. 9 (D.D.C. 1994), rev'd, 90 F.3d 525 (D.C. Cir. 1996).

The NCUA's petition for certiorari also seeks review of this Court's earlier determination in First Nat'l Bank & Trust Co. v. NCUA, 988 F.2d 1272, 1275 (D.C. Cir.), cert. denied, 510 U.S. 907 (1993) ("NCUA I"), that plaintiff banks had standing to enforce the FCUA's "common bond" requirement. That standing decision conflicts with the Fourth Circuit's decision in Branch Bank & Trust Co. v. NCUA, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987). This split between circuits likewise indicates that defendants have raised a "serious legal question."[5]

Certainly, if the Supreme Court grants certiorari on these questions, it would confirm the Solicitor General's view that the case is important and that the defendants have a substantial case on the merits.

2. The defendants also have raised a "serious legal question" as to whether laches precludes the extensive relief sought by plaintiffs. Under the doctrine of laches, an otherwise meritorious suit must be dismissed if (1) there has been

[5] For the Court's convenience, we have attached a copy of the certiorari petition filed by the Solicitor General so that the Court can weigh the seriousness of our claim.

unreasonable delay in bringing the claim for relief, and (2) that delay has caused prejudice. Independent Bankers Ass'n of Am. v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam). The NCUA publicly announced the multiple group policy on April 20, 1982, 47 Fed. Reg. 16775. Yet plaintiffs waited until 1990 to challenge application of this policy to the AT&T Family credit union. More important, the first time any plaintiff in any case sought to bar the addition of new members to previously approved groups was on October 7, 1996, when plaintiffs here filed the ABA case (Civ. Action No. 96-2312), 14 years after the NCUA announced its multiple group policy. Thus, neither the NCUA nor the thousands of federal credit unions that it regulates were on notice that relief of this type would ever be sought or granted. To the contrary, the relief requested in the First National complaint sought only an injunction against the addition of new, unrelated employee groups to AT&T Family's field of membership. Therefore, NCUA and the federal credit unions reasonably expected that such relief would be the worst outcome of the AT&T case. See Lever Brothers Co. v. United States, 981 F.2d 1330, 1338 (D.C. Cir. 1993) (plaintiff only entitled to an injunction limited to the relief specifically sought in plaintiff's complaint).

Even if laches did not preclude the extensive relief that has now been requested and granted, the district court's injunction clearly should be limited to select employee groups

("SEGs") added within the six-year statute of limitations period. See 28 U.S.C. § 2401(a).

B. The NCUA, Credit Unions, and Members of the Public Will Suffer Irreparable Injury Absent a Stay.

The district court's injunction threatens the survival of many existing federal credit unions across the country. To date, nearly 3,600 federal credit unions (or 50% of all federal credit unions nationwide) serving over 32 million people have relied on the NCUA's common bond policy to absorb some 157,000 employee groups, with millions of members. See Second Declar. of David M. Marquis (Oct. 9, 1996) at ¶ 5 (attached); Third Declar. of David M. Marquis (Nov. 14, 1996) at ¶ 7 (attached). Of the nation's 200 largest federal credit unions, 158 have multiple employee groups, with such groups constituting 38% of their credit union's membership. Id. at ¶ 8. These credit unions have relied on the unchallenged continuation of their existing SEGs and made enormous capital expenditures to serve their constituent groups.

These concerns are not merely theoretical. For example, the inability to add new members from existing select employer groups erodes the health of credit unions, which must continually add new members in order to replace those lost through attrition from death, retirement, or other circumstances. Furthermore, the inability to add new members creates strong disincentives to continued participation by those employee groups who cannot add new members. Thus, if credit unions are prevented from admitting

new members from existing SEGs, many employers will be forced to withdraw their sponsorship from credit unions because they will be unable to offer the benefit of credit union membership equally to all employees. See Bogardus, Gessert, Avant, & Wetzler Affs., ¶ 4; Crisp, Hess & Davis Affs., ¶ 3; Crvarich Aff., ¶ 5 (attached).

NCUA estimates that over 200 multiple group federal credit unions will begin to suffer financial losses in less than six months. See Third Marquis Declar. at ¶ 9. The percentage of financially threatened credit unions rises with each month. In fact, credit unions chartered under the NCUA common bond policy henceforth will suffer an aggregate amount of $32.5 million per month in lost loan income. Third Marquis Declar. at ¶ 10.

Not only will credit unions suffer harm from the October 25 injunction, but the order also causes irreparable harm to members of the public. First, and most significantly, the district court's injunction has abrogated the right of new and current employees of previously approved SEGs to join a federal credit union. These employees, especially those who earn low wages, are thus deprived of the many benefits of credit union membership, including easier access to credit, favorable rates, and no-fee financial services. See Crisp, Hess, & Davis Affs., ¶¶ 2-3; Gessert Aff., ¶ 3.

Second, without a stay, tens of thousands of previously eligible consumers will be denied credit union membership each

month. See Affidavit of Keith Peterson, Vice President of CUNA's Economics and Statistics Department ¶ 9 (attached). Defendants conservatively estimate that, as a result of the injunction, 1,112 consumers are being denied access to membership in multiple group federal credit unions each calendar day. Id. at ¶¶ 9-10.

Moreover, denying access to credit unions will have the most severe impact on low-income SEG employees and their families, many of whom are precluded from banking services due to high fees and balance requirements imposed by banks. See Affidavit of Stephen Brobeck, Executive Director of Consumer Federation of America at ¶ 4 (attached). Furthermore, banks often do not offer credit to these individuals. Id., ¶ 5. Without a credit union, these low-income individuals may have to turn to high interest finance companies or check-cashing operations, or do without credit altogether.

Under the circumstances, the equities favor a complete stay of the district court injunction. But, at the very least, plaintiffs' protracted delay in seeking an injunction against the addition of new members to previously approved groups warrants a stay of such relief. See Heimann, 627 F.2d at 488.

C. Any Harm To Plaintiffs' Member Banks Due To The Issuance Of A Stay Will Be Minimal.

In contrast to the substantial harm that credit unions, potential members, and sponsoring employers will suffer in the absence of at least a partial stay, the issuance of a stay should not "substantially injure" plaintiffs or the ABA's institutional

member banks during the limited time involved. See Hilton, 481 U.S. at 776. At most, plaintiffs have alleged that, without preliminary relief, continued competition from SEG credit unions will erode the current customer base of their member institutions. See Pltfs. TRO Reply Mem. at 9. Even if plaintiffs had substantiated their assertions of "competitive injury" (which we vigorously dispute) the continued enrollment of members from previously approved SEGs, or even the addition of new SEGs, while defendants seek appellate and Supreme Court review would scarcely have an impact on the financial health of the American banking industry.

The relative size of this vast industry, as juxtaposed against the credit union industry, itself demonstrates how insubstantial any competition from new credit union membership could be. As of June, 1996, the assets of all federally-insured banks and thrifts totalled approximately five trillion dollars; those of all federally-insured credit unions totalled $323.7 billion, and those of federal credit unions containing select employee groups totalled $150 billion. Affidavit of Wayne Winegarden, NAFCU Staff Economist at ¶ 5 (attached); Second Marquis Declar., ¶ 5.

The asset growth of the banking industry over the last fifteen years also suggests that any competitive harm will be minimal: from 1982 to 1996, the average assets of the banking industry increased $158.1 billion each year; the assets of all

federal credit unions increased only by $159.8 billion over this entire fifteen-year period. Winegarden Aff. at ¶ 6. Where, as here, the district court's injunction will, in as few as six months, cause substantial loss of earnings and capital investment in the credit union industry, and where there is no evidence that a stay would threaten the profits of plaintiffs of the ABA's institutional members, the balance of equities clearly favors a stay pending appeal. See United States v. Western Electric Co., 774 F. Supp. 11 (D.D.C. 1991) (stay pending appeal of order permitting regional telephone companies to participate in new market was appropriate because stay did not significantly harm regional companies, whose primary business would remain profitable); cf. WMATC v. Holiday Tours, 559 F.2d at 843 n.3 ("The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact.") Indeed, plaintiffs' own behavior belies any threat of real, immediate harm: where their member banks waited 14 years to challenge the multiple group policy, they cannot now protest that a limited stay -- one that may last no longer than the remainder of the Supreme Court's term -- will cause them injury.

Given the balance of equities, permitting federal credit unions to continue to add new select employee groups and enroll new members from previously approved employee groups by granting a full stay of the district court's October 25th injunction is appropriate. At a minimum, equity supports the grant of a

partial stay that would maintain the status quo by permitting federal credit unions to allowing new members from previously approved groups to join existing credit unions.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the district court's October 25th order be stayed pending appeal and pending the Supreme Court's final disposition of defendants' petition for certiorari in First National. In the alternative, defendants request that the Court stay that portion of the district court's order banning the enrollment of new members from previously approved employee groups.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 1996, I served the foregoing Motion for a Stay Pending Appeal and Pending Supreme Court Review by causing two copies, except as otherwise noted, to be mailed, postage prepaid, to:

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ATTACHMENTS

1. Second Declaration of David M. Marquis
2. Third Declaration of David M. Marquis
3. Affidavit of Betty Bogardus
4. Affidavit of Milton G. Gessert
5. Affidavit of J. Dalvin Avant, Jr.
6. Affidavit of Mitch Wetzler
7. Affidavit of Nancy Crisp
8. Affidavit of John Hess
9. Affidavit of L. Bill Davis
10. Affidavit of Gene S. Crvarich
11. Affidavit of Keith Peterson
12. Affidavit of Stephen Brobeck
13. Affidavit of Wayne Winegarden
14. Petition for Certiorari, NCUA v. First National Bank and Trust Co., No. 96-843 (U.S. Nov. 26, 1996) (w/o appendices).

A D D E N D U M

1. Memorandum and Order, First National Bank and Trust Co. v. NCUA, Nos. 90-2948 & 96-2312 (D.D.C. Oct. 25, 1996)

2. Memorandum and Order, First National Bank and Trust Co. v. NCUA, Nos. 90-2948 & 96-2312 (D.D.C. Oct. 31, 1996)